

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

76-6065

IN THE
United States Court of Appeals

FOR THE SECOND CIRCUIT

CITY OF ROCHESTER AND GENESEE-FINGER
LAKES REGIONAL PLANNING BOARD,
Plaintiffs-Appellants,

v.

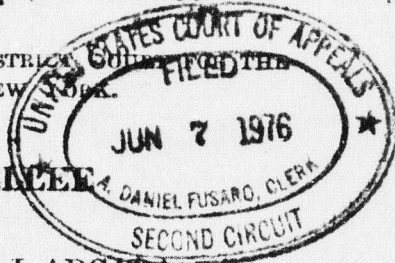
UNITED STATES POSTAL SERVICE and
BENJAMIN F. BAILAR, UNITED STATES
POSTMASTER GENERAL,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLEE

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REGIONAL PLANNING BOARD,
Plaintiffs-Appellants,

v.

UNITED STATES POSTAL SERVICE and BENJAMIN
F. BAILAR, UNITED STATES
POSTMASTER GENERAL,
Defendants-Appellees.

BRIEF OF APPELLEE

Issues Presented*

1. Whether the abandonment of the Rochester Main Post Office (MPO) is an issue separate and apart from the construction of the new mail facility in the Town of Henrietta.

* The merits of this case have not been previously considered by this Court. By Order dated April 26, 1976, this Court granted Appellants' motion for an expedited appeal. The Appellees joined in the motion for expedited appeal. By order dated May 19, 1976, this Court granted the Columbia University Environmental Law Council leave to file a brief *amicus curiae*.

2. Whether the United States Postal Service has complied fully with the requirements of the National Environmental Policy Act (NEPA) regarding the construction of the Henrietta Mail Facility (HMF).

3. Whether the United States Postal Service (USPS) is exempt from compliance with the Intergovernment Cooperation Act (ICA) with regard to the HMF.

4. Whether, if the USPS is not exempt from the ICA, the USPS has substantially complied with the requirements of the ICA.

5. Whether the City of Rochester (Rochester) has standing to challenge the construction of the HMF.

6. Whether the Genesee-Finger Lakes Regional Planning Board (Planning Board) has standing to challenge the construction of the HMF.

7. Whether the Planning Board is barred by laches from maintaining this action against the USPS concerning the construction of the HMF.

8. Whether the City of Rochester is barred by laches from maintaining this action against the USPS concerning the construction of the HMF.

9. Whether the abandonment of the MPO amounts to a justiciable controversy ripe for judicial determination.

10. Whether the injuries claimed by the plaintiffs below regarding the abandonment of the MPO are sufficient to actuate the controls of NEPA.

Statement of Case

By motion dated January 13, 1976 the City of Rochester (Rochester) and the Genesee-Finger Lakes Regional Planning Board (Planning Board) sought a preliminary injunction enjoining the United States Postal Service and Benjamin Bailar as Postmaster General (hereinafter both defendants will be referred to as USPS) from abandoning the Rochester Post Office (MPO) and from further construction of the Henrietta Mail Facility (HMF) pending a final adjudication of the merits of the allegations of plaintiffs' complaint (App. 11-124*).

The plaintiffs' complaint dated January 13, 1976 requested a permanent injunction against the USPS enjoining it from abandoning the MPO and further construction of the HMF pending the filing of an Environmental Impact Statement (EIS) pursuant to NEPA (App. 1-10).

On January 26, 1976, after oral argument, the District Court (Harold P. Burke, USDJ) orally denied plaintiffs' motion for a preliminary injunction and, pursuant to Rule 65(a)(2) of the Federal Rules of Civil Procedure, ordered a prompt trial of the action on the merits to begin on February 19, 1976. The non-jury trial was held on February 19, 20, 26 and 27, 1976.

By order dated March 23, 1976 (App. 133-146), the District Court issued findings of fact and conclusions of law and denied plaintiffs' demands for a permanent injunction and declaratory judgment in all respects and ordered that the action be dismissed. Judgment dismissing the action was entered on March 24, 1976 (App. 147).

* All references to the Appendix will be abbreviated "App."; references to the Transcript will be abbreviated "Tr." and references to the Exhibit Book will be abbreviated "Ex.". Numerals appearing after each abbreviation refers to the relevant pages of each item.

Statement of Facts

The USPS was aware as early as 1965 that the MPO was inadequate to handle existing and anticipated mail processing needs (App. 447-448). In addition, the MPO provided sub-standard working conditions for its employees (App. 447-448; Ex. 250-283). To abate this situation, the USPS leased a building in the Town of Henrietta in 1968 and split the mail handling functions between the MPO and this Sectional Center Facility in Henrietta (App. 451-452). This Sectional Center Facility is 6 or 7 miles from the Main Post Office and about one mile from the HMF which is the subject of this litigation (App. 451-453). Due to increased mail volume, acquisition of major mail processing equipment requiring larger work areas and increased travel requirements of this split operation, this situation is not only inefficient, unnecessarily costly and inhibiting to proper levels of productivity, but is simply not big enough to handle the mail volume (App. 451-462). No employees were lost as a result of the move to the Sectional Center Facility and complaints were minimal (App. 453).

In August, 1970, the Rochester Postmaster requested active consideration of a plan to construct a general mail and vehicle maintenance facility to serve the Rochester metropolitan area (App. 447). Between 1970 and early 1974 the USPS completed exhaustive studies of the existing facilities; alternatives to new construction; sites for new construction; effects of job relocation on existing and potential employees; mail processing needs projected to 20 years; numerous site considerations and virtually every possible consideration associated with the proposed project (App. 160-402). The USPS determined that a new facility would be required and that a site of no less than 36 acres would be required (Ex. 145-159, App. 384-385). In February, 1973 a USPS Real Estate specialist went to the Assessor's Office in the City of

Rochester and Towns of Gates, Brighton, Chili, and Greece and conferred with a representative of the New York State Urban Development Corporation to determine whether any sites of the minimum size were available in and around the City of Rochester (App. 384-390).

After completion of numerous studies and reports, the USPS determined that the best available site for the new facility was in the Town of Henrietta (App. 383-406). Following submission of an additional study labeled "environmental Impact Assessment" prepared by Cannon Partnership (App. 40-75) the responsible agency official, William Usher, made the negative determination that the proposed project will not significantly affect the quality of the human environment (App. 406-414). This determination was based upon the complete reviewable record prepared by the USPS in connection with this project (Ex. 160-402, App. 40-75, App. 139, 142-143).

In January, 1974, articles appeared in local newspapers announcing that the USPS expected to build a new mail facility in the Town of Henrietta (App. 43-45).

The City of Rochester has been aware of the construction of the HMF since January, 1974 (App. 36, 37, 78-79, 80). In fact, as early as May, 1974 the City officials made efforts to block the proposed construction in the Town of Henrietta (Ex. 49). In March, 1974 the City of Rochester was fully aware of the USPS positions regarding the proposed facility (Ex. 61-68).

The Planning Board has been aware of the construction of the HMF since at least March, 1974 (Ex. 80-86; App. 361-370, 312-313).

In June, 1974 an article appeared in the local newspapers announcing the purchase of the site in the Town of Henrietta (Ex. 51, 57, 401).

Despite repeated contacts by the directors of the Planning Board and its executive Director, concerning the HMF, and despite numerous newspaper articles on the subject of the project and despite repeated contacts with officials of the City of Rochester regarding the project, the Planning Board and Rochester claim they first heard of the proposed construction in August, 1975 from a newspaper article (App. 95). However, even if this were true, although contrary to the evidence, the plaintiff waited almost six months before bringing suit (App. 1-10). At this point the project was 18% completed and some \$8,000,000 had been expended on the project, not including the cost of land (App. 267, 430; Ex. 419-437).

The City of Rochester offered no proof of injury except the testimony of John Stainton who concluded that, if the MPO were abandoned, three types of impact were of concern:

1. blighting influence of an abandoned building
2. loss of income to city merchants because U.S.P.S. employees would no longer be downtown and
3. low and moderate income people would have trouble getting a job at a new facility seven miles away (App. 243-244, 353).

However, that witness, in substance, retracted each of those complaints on cross-examination, at least as to the construction of the HMR (App. 312-330, 353).

The Planning Board witnesses offered no proof of injury from the new construction of the HMF or the abandonment of the MPO. Their only concern was that the U.S.P.S. did not consult with them on the project or perhaps could have purchased cheaper property (App. 150-235).

Neither Rochester nor the Planning Board offered any direct proof of any injury, let alone environmental injury,

with regard to the construction of the HMF. Furthermore, with the exception of some speculations of possible injuries, no direct proof was presented of environmental injury as the result of the abandonment of the MPO.

Moreover, the conclusive testimony of the U.S.P.S. is that occupancy of the HMF is not scheduled until September, 1977. After that date, approximately 25% of the MPO will be occupied by the U.S.P.S. for a customer service facility, and the total building and MPO area would be maintained and cared for by the U.S.P.S. (App. 459-461).

Summary of Argument

The Appellants bear an extremely heavy burden in its attempt to show that the District Court erred in concluding that the USPS has complied fully with NEPA.

First of all, in this Circuit an agency's threshold determination as to whether or not a detailed EIS is required, for a particular action will not be overturned unless it is "arbitrary, capricious," or "an abuse of discretion." *Hanly v. Kleindienst*, 484 F.2d 448, 449 (C.A. 2, 1973) ("Hanly III"); *Morningside Renewal Council v. AEC*, 482 F.2d 234, 238 (C.A. 2, 1973); *Hanly v. Kleindienst*, 471 F.2d 823, 829-830 (C.A. 2, 1972) ("Hanly II"), *cert. denied*, 412 U.S. 908.

Furthermore, having already failed to convince the Court below of the substantiality or relevance of its factual allegations regarding a NEPA violation, the appellants must now demonstrate to this Court that the factual findings below were "clearly erroneous." *Biderman v. Morton*, 507 F.2d 396, 398 (C.A. 2, 1974); *Chick v. Hills*, 528 F.2d 445, 448 (C.A. 1, 1976); *Cumington Preserv. Com. v. Federal Aviation Ad.*, 524 F.2d 241, 243 (C.A. 1, 1975); *Sierra Club v. Morton*, 510 F.2d 813, 818 (C.A. 5, 1975) Rule 52, Fed. Rules of Civ. Proc. As the Supreme Court stated in *United States v. United Gypsum Co.*, 333 U.S. 364, 395 (1948):

A finding is "clearly erroneous" when although there is evidence to support it, the reviewing Court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. See also *Esso Standard Oil Co. v. The S.S. Kaposia*, 259 F.2d 486, 489 (C.A. 2, 1958). In addressing this question, however, this Court does not "****retry the facts, and a finding based on sharply conflicting evidence is binding here." *United States v. 79.95 Acres of Land*, 459 F.2d 185, 187 (C.A. 10, 1972); *Buena Vista Homes, Inc. v. United States*, 281 F.2d 476 (C.A. 10, 1960).

ARGUMENT

POINT I

The abandonment of the MPO is an issue separate and apart from the construction of the HMF.

It is the Government's position that the appellants are asking this Court to expand the focus of the National Environmental Policy Act (NEPA) far beyond that intended by Congress, and well beyond the limits ever considered appropriate by any Court even considering that statute. No Court has ever held that NEPA extends to the considerations set forth in plaintiff's complaint. This is true despite the judicial tendency to construe the statute so loosely that it prompted Chief Justice Burger to issue the following admonition:

Our society and its governmental instrumentalities, having been less than alert to the needs of our environment for generations, have now taken protective steps. These developments, however praiseworthy, should not lead Courts to exercise equitable powers loosely or casually whenever a claim of "environmental damage" is asserted. *Aberdeen & Rockfish R. Co. v. SCRAP*, 409 U.S. at 1217 (1972).

To accomplish that end, the plaintiffs have attempted to bring the abandonment of the MPO within the purview of NEPA by artfully pleading it as a direct and permanent result of the construction of the new facility in Henrietta (HM).

The government does not deny that the HMF is designed to accommodate all mail processing requirements of the metropolitan Rochester area. To effect this, the USPS will transfer the job site of approximately 1400 employees from the MPO approximately 7 miles to the HMF. In addition, the job sites of approximately 400 employees of the Sectional Center Facility in Henrietta will be moved one mile to the HMF (App. 445-477).

However, the only claim of any injury to Rochester and the Planning Board, and manifestly the only proof at trial, is that certain social and economic harm will result if the MPO is abandoned. The plaintiff's witnesses at trial conceded that there is no injury resulting from the construction of the HMF itself (App. 352-355, 172-179, 230-231). In the absence of injury, the plaintiffs lack standing to challenge the construction of HMF on NEPA grounds. This issue of standing is discussed in detail in another portion of the brief.

Given that the only proof of injury in the whole trial results solely from the suspected abandonment of the MPO, the appellants would be fully protected by an injunction enjoining the abandonment of the MPO. The government does not concede that this is a proper remedy, but submits this as illustration. However, if such relief were granted, the construction would proceed without problem; the USPS will not suffer irreparable injury in terms of delay and lost time, and substantial savings would accrue to the USPS because it could transfer its employees at the Sectional Center Facility to the HMF and not have to pay rent for the leased building (App. 462).

POINT II

The USPS has complied fully with the requirements of NEPA regarding construction of HMF.

A. Construction of HMF.

The USPS concedes that the new construction in Henrietta is a major federal action within the purview of NEPA. However, the threshold determination by USPS was that a formal environmental impact statement (EIS) was not required because the proposed construction would not have a significant effect on the quality of the human environment. This decision was based on a substantial reviewable record considering every possible aspect of the impact of the new facility now under construction in the Town of Henrietta (App. 139, 142-143; Ex. 87-410). The continued use of the MPO is not contingent on the construction of the new facility and no decision has been made to totally abandon the MPO. In fact, at least the total building will be used until September 1977 (the date for occupancy of the new facility) and at least 25 per cent use will be made of the MPO for the foreseeable future to provide customer service to the people of the City of Rochester. In either case the MPO will be cared for and maintained totally by the USPS (App. 445-465).

Maryland-National Capital Park and Planning Comm'n v. United States Postal Service, 487 F.2d 1029, 1040 (D.C. Cir. 1973), establishes an appropriate matrix for judicial analysis of whether a federal agency properly concluded that a proposed action would not significantly affect the quality of the human environment, and, hence, that an EIS is not required:

First, did the agency take a "hard look" at the problem, as opposed to bold conclusions, unaided by preliminary investigations?

Second, did the agency identify the relevant areas of environmental concern?

Third, as to problems studied and identified, does the agency make a convincing case that the impact is insignificant?

[Fourth,] (i)f there is impact of true "significance" has the agency convincingly established that changes in the project have sufficiently minimized it?

In reviewing each of these questions in light of the administrative record of this proceeding, it is clear that the USPS has fully complied with both the form and spirit of NEPA.

B. Reviewable Administrative Record

NEPA does not dictate precise procedural requirements for a federal agency to follow in making a threshold determination. *Hanly v. Kleindienst*, 471 F.2d 823, 825 (2d Cir. 1972) (Hanly II). In this regard, the administrative NEPA provisions apply only to the procedures to be followed for preparation of detailed impact statements *after* the agency has determined preliminarily that the major action *would be* significant. *Hanly v. Kleindienst*, 471 F.2d 823, 835-36; *see also, dissent Friendly*, C.J., 471 F.2d at 836 *et seq.* (2d Cir. 1972).

Therefore, if the action would not have a significant impact on the environment, these procedures need not be followed.

The USPS made a preliminary determination that the proposed construction of the new facility in the Town of Henrietta would *not* significantly affect the quality of the human environment. Since no EIS was required, the USPS was *not* required to comply with the procedural requirements of Section 102(2)(c) of NEPA. It is only this section that *requires* referral of the plan to state and local agencies.

While NEPA does not dictate the precise form of the record which must be made at the agency level, its thrust is to force each federal agency to consider the effect of its actions as they relate to the environment. Consequently, it imposes the duty on the agency to set up procedures which will assure a fair and informed preliminary decision. *Hanly II*, at 834-36.

This requirement in the Second Circuit is that federal agencies must "affirmatively develop a reviewable environmental record" *Hanly I*, 460 F.2d 647. See also, *Hanly II*, *supra*. Although no Court has specifically defined just what a "reviewable record" consists of, the Second Circuit in *Hanly I* approved an agency determination that no EIS was required where the determination was based on a one-page memorandum. *Hanly I*, 460 F.2d at 645-46 (2d Cir. 1972). In its decision, the Court took notice that, although the memo did not specifically mention aesthetic and architectural considerations, the neighborhood was of such a mixture that this failure would not be considered a "vital flaw". Despite the fact that this Court actually had to consider information outside of the reviewable record, it concluded that the "actual impact appears to be minimal and adequately accounted for in the . . . memorandum" *Hanly I*, 460 F.2d at 646 (2d Cir. 1972).

Although other cases, and indeed the Court in *Hanly I*, have required a more extensive record in some cases, this decision is illustrative of the fact that there is no specific or precise requirements that the agency must perform in arriving at its threshold or preliminary determination.

In the case at bar, this Court need not rely on a single memorandum, but has an exhaustive record prepared by the USPS in connection with its decision to build a new facility in the Town of Henrietta.

It is respectfully submitted that the reviewable record in this case consists of the following:

1. *Distribution and Operations Concept* (Ex. 87-99)—this document details major concept of how a new facility must operate based on 10 and 20 year projections and designates preferred site area on west side in the City of Rochester.

2. *Revised Distribution and Operations Concept* (Ex. 133-141)—substantially the same as previous document, but shows numerous revisions by United States Postal Service. Preferred site in this document was General Dynamics Building in Rochester, N.Y.

3. *Evaluation of Main Post Office and Vehicle Maintenance Facility at 216 Cumberland Street and Rochester Sectional Center on 2340 Brighton-Henrietta Townline Road* (Ex. 100-112).

4. *Evaluation of General Dynamics Building in the City of Rochester* (Ex. 113-132).

5. *General Planning Assumptions* (Ex. 145-159)—this is a requirements study based upon 10 and 20 projections for mail operations and designates minimum site size requirement of 36.1 acres.

6. *Site Selection Search Report* (Ex. 191-249)—this document shows that at least 15 sites were investigated both in and around the City of Rochester and that only 7 were proposed as available for United States Postal requirements.

7. *Preliminary Site Selection Report* (Ex. 160-190)—this document shows final focus on 7 sites with locations and evaluation by Site Selection Team consisting of representatives of all phases of postal operations including Equal Employment Opportunities Division.

8. *Working Conditions Improvement Program Report* (Ex. 250-283)—this document evaluates the working conditions at the Main Post Office and evaluates deficiencies and dangers with the conclusion that the Main Post Office should be replaced as soon as possible. This was prepared by outside architectural engineering firm.

9. *Site Selection Team Recommendation* (Ex. 284)—this document recommends Site No. 5 in Town of Brighton, but points out the rezoning is required. The second choice is No. 6 in the Town of Henrietta. Site No. 6 is the location of a new facility under construction and did not require a change in zoning.

10. *Equal Employment Opportunity Study* (Ex. 285-300)—this document evaluates the profile of current work force and services for employees in the City of Rochester, and what effect each of the seven sites in Preliminary Site Report (Exhibit D-35) would have on current employees.

11. *Equal Employment Opportunity Focus Study* (Ex. 301-302)—this document focuses consideration of sites No. 5 and No. 6 and points out that from employee standpoint "housing and relocation of lower level employees is acceptable and positive".

12. *Functional Design Specifications* (Ex. 303-348)—this document describes the configuration, layout and site utilization of the proposed building on 36.1 acres site wherever it is located.

13. *Decision Analysis Report* (Ex. 349-398)—this document is an analysis of the alternatives of constructing a new facility on site No. 6 or renovating the MPO with construction of an Annex to that building. It concludes that the new facility is the best choice for the USPS.

14. *Approvals by Capital Investment Committee and Board of Governors for United States Postal Service* (Ex. 399-409).

15. *Photo Report of Site No. 6* (Exhibit D-45).

16. *Appraisal Report for Site No. 6* (Exhibit D-46)—this document shows the United States Postal Service paid fair market value for the subject property.

17. *News Release of Site Purchase* (Ex. 410)—this was published and articles referring to site purchase were published in both the *Times-Union* and *Democrat and Chronicle*.

18. *Environmental Assessment* (App. 40-76)—this document only considered Site No. 6 in Henrietta. It had a limited scope because all other aspects of environmental considerations were handled in other reports. The fact that it is called "Environmental Assessment" is not controlling as to whether the responsible officer considered all other documents in making its threshold determination.

19. *Negative Determination* (Ex. 411-417)—this threshold determination was based not only on the Exhibit P-4, but all other studies and documents prepared by the United States Postal Service in connection with this action as well. This fact was testified to by William Usher, the responsible official for the United States Postal Service (App. 408-417).

20. *Testimony and Exhibits offered at Trial.*

Based upon these documents, exhibits and testimony, it is submitted that the USPS made a careful, well-reasoned determination to build a new facility with consideration given to every alternative and environmental consideration possible, including the impact on the employees. It is inconceivable that a decision based upon this much information could be considered arbitrary or capricious or an abuse of discretion.

The record clearly shows that most of the controversy in this case centers primarily on the wisdom of the USPS management decision requiring 36.1 acres minimum property size to properly process mail; why it has to be situated in a one-story facility and why couldn't the USPS just renovate the MPO and stay in Rochester. These questions are not appropriate for judicial review. *Hanly I*, (2d Cir. 1972). The remainder of Appellants' argument concerns issues that are speculative; not supported by any concrete evidence and not yet controversies (App. 133-142). These are discussed specifically in other portions of this brief.

**C. National Environmental Policy Act
(Title 42, U.S.C., §4321 *et seq.*)**

In enacting NEPA, Congress was concerned with the wholesale destruction of our Nation's environmental resources. See: S. Rept. No. 91-296, 91st Cong., 1st sess. 8-9 (1969). Thus, NEPA was and is an act focused on the preservation of those resources needed to sustain present and future generations.

This view is summarized as follows:

"Drawing upon the testimony presented to this and other committees, however, the committee believes that the following basic propositions summarize the situation of contemporary America and the Federal Government regarding the management of the environment:

1. Population growth and increasing per capita material demands are placing unprecedented pressures upon a finite resource base.
2. Advancing scientific knowledge and technology have vastly enlarged man's ability to alter the physical environment.
3. The combination of the foregoing conditions presents a serious threat to the Nation's life support system.
4. The attainment of effective environmental management requires the Nation's endorsement of a set of resource management values which are in the long-range public interest and which merit the support of all social institutions."

S. Rept. No. 91-296, 91st Cong., 1st sess. 5 (1969); see also, H. Rept. No. 91-378, 91st Cong., 1st sess. 23 (1969).

Since the construction of new facilities in any major federal action has the potential of injuring our environment, NEPA requires that due concern be taken for the environmental impact of any such action.

NEPA requires that the federal agency concerned must make a dual threshold determination:

FIRST: Is it a "major federal action"

SECOND: If so, is it one that significantly affects the quality of the human environment

See: Title 42, U.S.C. §4332(2)(c). If the answer to both of these questions is affirmative, then NEPA requires that a detailed environmental impact statement be prepared. At this point precise procedural requirements are set forth in the statute. However, prior to this determination the statute does not require presentation of the matter to state or local agencies or specifically any other requirements. The A-95 Review requirement under NEPA regulations only obtains *after* a decision has been made to file an EIS. A-95 Review is then and only then part of the required steps to be taken by the federal agency.

On the other hand, if the contemplated action will *not* "significantly affect the quality of the human environment" then no EIS is required. Moreover, judicial review of this decision is limited to determining whether this preliminary determination is arbitrary, capricious or an abuse of discretion based upon the agency having a "reviewable administrative record." *Hanly I, Hanly II, Hanly III* (2d Cir. 1972).

In this case, the USPS concedes that its construction is a "major federal action". But, because it does not affect significantly the quality of the human environment, no EIS is required. This decision was based upon the entire reviewable administrative record previously described in this brief.

Plaintiffs' complaint does not allege even a single instance of environmental harm caused by the construction of the new facility in Henrietta (App. 1-10).

POINT III

USPS is not subject to the ICA

The USPS is not subject to the ICA. The ICA was passed in 1968. In passing the Postal Reorganization Act (Pub. Law 91-345, 1970), Congress specifically limited the number of federal laws applicable to the USPS. In this regard, Title 39, United States Code, Section 410 (a) provides;

Except as provided by subsection (b) of this section . . . no federal law dealing with public or federal contracts, property, works, officers, employees, budgets, or funds, including the provisions of chapters 5 and 7 of Title 5, shall apply to the exercise of the powers of the Postal Service.

While certain statutes are excepted from this provision and are listed in Section 410 (b), the ICA is not included among them. This omission is particularly significant because ICA was enacted *prior* to the Postal Reorganization Act. Therefore, it must be presumed under the principles of statutory construction that Congress did not intend for ICA to apply to the USPS.

However, Appellants argue that the ICA is a policy statute, similar to NEPA, and submit that the USPS is not exempt from compliance based upon the Second Circuit's reasoning in *Chelsea Neighborhood Ass'n v. USPS*, 516 F. 2d 378 (1975). The Government urges that the reasoning in *Chelsea* should not be applied to the ICA, not only because the legislative history of the Postal Reorganization Act speaks specifically to statutes like the ICA, but also because we can ascertain the Congressional intent by a very pertinent analogy in Section 410 itself.

Title 39 United States Code, Section 410(b) (4) specifically lists those provisions of Title 40 which shall apply to the

USPS. Obviously, those provisions of Title 40 not mentioned therein do not apply. Absent from this section is Title 40, United States Code, Section 533 governing the acquisition or change of use of real property by Federal agencies. Since this section requires the same type of cooperation with local governments as the ICA, it would seem to follow that Congress wanted the USPS to be bound by this type of statute, it would have specifically stated the application of Section 533. Since it did not, we submit that Congress intended to exempt the USPS from this type of regulation.

It is clear that the language of Section 410(a) creates a broad exemption. Congress' choice of the words "dealing with" emphasizes the broadness of the exemption. The choice of these words evinces a legislative intent to exempt the USPS from not only those laws which expressly regulate the areas set forth in Section 410(a), but also legislation, like ICA, enacted for some other purpose, but which affects those areas in certain circumstances. Inasmuch as the proposed mail facility in this case involves at least three of the Section 410 (a) factors, namely, federal contracts, works, and property, for the Court to apply ICA to the activities here is to interfere with the very areas which Congress left free from regulation.

The words, "including the provisions of Chapters 5 and 7 of Title 5" in Section 410(a) further support the broad application of this exemption. Chapters 5 and 7 of Title 5 only incidentally affect contracts and property. By using the word "including," rather than "and," Congress sought to give the exemption in Section 410(a) the broadest meaning. If, by the express words of section 410(a), Congress intended to include the Administrative Procedure Act among those laws "dealing with ... Federal contracts, property, works..." then it clearly does not strain any principle of statutory interpretation to reason that ICA is also included among those laws which do not apply to the Postal Service.

The House and Senate Reports, as well as the floor debates, concerning the Postal Reorganization Act are replete with indications that it embodies policies inconsistent with the procedural requirements of ICA.

The Senate summarized the need for major reforms in the Postal Service as follows:

The committee's inquiries and every responsible study show that the Postmaster General is blocked or undercut at every turn by the labyrinth of Postal statutes echoing every postal concern, interest, or whim expressed by Congress over a 200-year period. Laws have changed laws and have added to the body of them so that, by accretion, they have multiplied decade by decade leaving the Postmaster General bound in his own house. Twist and turn as he may, he cannot function in the public interest as a responsible manager S. Rep. No. 912, 91st Cong., 3d Sess. 2 (1970).

Accordingly, the Postal Reorganization Act was intended to relieve the USPS from the bureaucratic requirements which choked-off its efficiency. In the absence of any evidence of Congressional intent to the contrary, ICA must be considered among those requirements from which Section 410(a) exempts the Postal Service. *CF. Cohen v. Price Commission*, 337 F Supp 1236, 1241-42 (S.D.N.Y. 1972).

In the Postal Reorganization Act, Congress provided that the Postal Service would no longer be a cabinet-level department, but rather an independent establishment of the executive branch. 39 USC § 201 *et seq.* (1970). It intended that the USPS would have the general power to operate in a businesslike way. H.R. Rep. No. 1104, 91st Cong., 2d Sess. 5 (1970). To effectuate this policy, Congress exempted the Postal Service from laws generally applicable to other government agencies.

Federal statutes relating to contracts, employment policies, apportionment of appropriations, the development and submission of budgetary requests to Congress for its consideration, and the *acquisition and disposition of real and personal property* impose restrictions which in our view are not desirable if we intend to operate the Post Office as an independent public service agency of the government. Laws which are *appropriate to government management generally, which insure compliance with policies which Congress has determined to be in the best public interest for government agencies generally, are not the best method of control in the case of the Post Office.* They have proven to be a hinderance to postal modernization. . . . Except as specified in the bill, all laws relating to public works, contracts, employment, appropriation, budgeting, and any other laws governing agency operations are made inapplicable to the Postal Service. 116 Cong. Rec. 21709 (1970) (remarks of Senator McGee) (emphasis added).

To the extent that prior postal laws impeded the efficiency of the Postal Service, Title 39, itself, repealed them. Laws of general applicability, however, were not repealed because they were intended to continue to effect other federal agencies. The only effective way to relieve the Postal Service from restrictions imposed by non-postal laws was to enact Section 410(a).

The Board of Governors shall have broad authority and *shall not, except as specified* be subject to Federal laws dealing with contracts, property, the civil service system, the Budget and Accounting Act of 1921, apportionment of funds, *and other laws which in most instances apply to Government agencies and functions.* S. Rep. No. 912, 91st Cong., 3d Sess. 5 (1970) (emphasis added).

Section 410(b) lists those statutes, otherwise inapplicable, which continue to apply to the USPS. ICA is not listed.

Section 410 of Title 39 . . . says that no law is applicable to the Postal Service unless it is set out in Title 39 or

unless the law is made specifically applicable to the Postal Service. 118 Cong. Rec. S10024 (daily ed. June 22, 1972).

In light of these circumstances, as well as the legislative history of the Postal Reorganization Act, the intent of Congress not to subject the Postal Service to the requirements of ICA is clear.

In the only case we can find on the subject, *City of Thousand Oaks v. United States*, 396 F.Supp 1306 the Court held that neither the ICA, nor NEPA were applicable to the Postal Service because of §410(a). In a short Order No. 74-285 (9th Cir. Oct. 1, 1974), the Court of Appeals reversed the decision, disapproving of the District Court's basis with regard to NEPA. The order indicates that the USPS must comply with NEPA, but since ICA was *not* mentioned, the Court can be presumed to have let that portion of the decision stand.

The Postal Service decision to enter into a project for construction of a building of this kind is, by very nature, almost entirely internal. It cannot share this decision-making process with any other agency. It alone has the ability and responsibility to control the sources of mail to be processed, its origins and its destinations after processing, the methods of transporting it to and fro. These items determine the volume of mail to be processed which in turn determine the number of employees needed, the kinds and numbers of mail processing machines, the amount of required dock and parking space and the like. Based on this, the building and lot size naturally follow.

Given these strictures, the Postal Service met and consulted with local officials in the areas under consideration. The extent of its compliance with local codes and plans is set out in the reviewable record.

While the Second Circuit held in *Chelsea Neighborhood Ass'n. v. United States Postal Service*, 516 F.2d 378 (2d Cir. 1975) that the USPS is subject to NEPA, the case has very little relationship to plaintiffs' reasoning regarding the ICA. In that case the Court held that since NEPA and the Postal Reorganization Act were considered by Congress *at the same time* and because of the unusual importance of NEPA, Congress could not have meant to exempt the USPS from NEPA. Since the ICA was passed in 1968 and the Postal Reorganization Act was passed in 1970, the *Chelsea* reasoning should not apply to the ICA. Clearly, if Congress had intended ICA to apply to the United States Postal Service it would have said so in Section 410(b).

POINT IV

The USPS has substantially complied with the ICA

The language of the ICA is not mandatory. In this regard, Title 42 United States Code, Section 4231(b) specifically states:

All viewpoints—national, regional, state and local—shall, *to the extent possible*, be fully considered and taken into account in planning Federal . . . projects (emphasis supplied).

While A-95 review by the Planning Board is one alternative for consideration of specific factors for community development available to the USPS, it by no means is the only means of complying with the ICA. In reality, it merely provides a convenient method to contract all interested land-use policy boards with one review procedure. However, it is not required. In fact, the effecting regulations contained in Office of Management and Budget Revised Circular A-95 (38 Fed. Reg. 32874) Part ii (2)(a)(3) merely "urge" Federal agencies to make early contact with such clearinghouses to the "greatest extent practical". Clearly, this language is not mandatory.

As an alternative, the USPS could make individual contacts with the local governments involved. In this case, the USPS made specific contacts with the City of Rochester and representatives of several Towns (App. 386). In fact, it was consideration of the Town of Brighton's land-use plan that provided the basis for the USPS to reject its first choice of a site. That site was zoned for residential use and, at the request of the Town of Brighton, the USPS abandoned consideration of that site (App. 397-398).

In choosing the site in the town of Henrietta, the USPS made contacts with Officials of that Town (App. 400-402). The site was zoned properly for the use contemplated by the USPS and, in fact, the only complaint the Town had was that the complete parcel would be removed from the property tax rolls (Ex. 50-51).

Furthermore, the site of the HMF is directly in the developmental corridor recommended by the planning Board (Ex. 37, App. 1777). It did not require a change of zoning to permit construction of the HMF (App. 182). Moreover, the Planning Board's principal objection to the site is not based on the environmental inadequacy of the site, but only because they were not consulted from the very inception of the project (App. 176, 231).

It is submitted that the USPS has, to the extent practical to it, conferred with appropriate local officials to insure consistent land-use development as is the policy of the ICA.

POINTS V and VI

The Appellants Lack Standing

In order to have standing to sue, the plaintiffs must demonstrate the following:

1. the challenged action must cause injury in fact.

2. this injury must be to an interest that is arguably within the zone of interests protected by the statute claimed to have been violated.

U.S. v. SCRAP, 412 U.S. 669 (1973); *Sierra Club v. Morton*, 405 U.S. 727 (1972); *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150 (1970).

Fundamental to the issue of standing is an examination of the separate aspects of this case: (1) the construction of the new facility in Henrietta and (2) the abandonment of the MPO in the City of Rochester. Clearly these aspects are entirely separable. The new construction in Henrietta has not been environmentally questioned; the MPO aspect is not environmentally questionable because the building will not be abandoned.

(1) The plaintiffs' case is totally devoid of any allegation, not to mention proof, of any injury by reason of the new construction. The new facility is totally within the Town of Henrietta and the use of the property as a mail facility is totally consistent with the existing zoning and the Master Plan for development. The Town of Henrietta had only one complaint against the USPS: the expectant loss of tax revenues. Furthermore, the Town has not raised any environmental issue and did not join as a party to this lawsuit.

Since no injury in fact was shown or could be shown by the plaintiffs, neither has standing to challenge the new construction in Henrietta.

(2) The plaintiffs are unable to show any injury in fact by reason of the abandonment of the MPO in the City of Rochester. While plaintiffs concern for the continued vitality of the City are legitimate, what they seek in this case goes far beyond what is judicially available to them. The simple fact is that the MPO in Rochester will not be abandoned. With the exception of one letter to the contrary, the USPS has con-

sistently maintained that the use of the MPO would continue. The only indications to the contrary come from documents that assume the existence of a third facility in the City. Since any new construction of the third facility would have to follow the same procedure as the new facility it is only reasonable to assume that it would take several years of study. Since that study is not truly feasible until the new facility is occupied, it necessarily follows that the MPO will be in use for the foreseeable future. Should a decision be made to the contrary, the USPS would be required to follow the applicable law. Not only has that decision not been made, it is not likely to be made in the foreseeable future. As such, no injury has occurred and no injury is likely to occur to the plaintiffs in the near future. Furthermore, the injuries suggested by the plaintiffs are so remote and speculative that they should not be considered real enough to allow judicial review of their claims.

Since no injury in fact can be shown by the plaintiffs, they lack standing to challenge the abandonment of the MPO at this time. In addition, the injuries claimed by the plaintiffs are not of the type sought to be protected by NEPA. Cf. *Maryland National Park and Planning Comm. v. United States Postal Service*, 387 F.2d 1029 (D.C. Cir. 1973).

POINTS VII AND VIII

The Appellants are Guilty of Laches

The Planning Board, knew as early as February, 1974 that the new facility would be built outside the City of Rochester. Stuart Denslow, the Executive Director of the Planning Board was on notice of the USPS plans as early as February, 1974 (App. 361-370). Angelo J. Chiarella, a member of the Board of Directors of the Planning Board, knew of the United States Postal Service plans as early as March, 1974 (App. 361-370).

By his testimony, Mr. Chiarella said he discussed this fact with Mr. Denslow and other members of the Board of Directors in 1974 (App. 364-370).

It is inconceivable that the Planning Board would now assert that it first heard of the USPS plans in August, 1975. That claim is fully rebutted by documentary evidence and testimony. In addition, numerous newspaper articles appeared in local papers throughout the period January 1974 to August 1975 (Ex. 43-57).

The plaintiff, City of Rochester, knew of USPS plans as early as February, 1974. Not only was the issue presented in the newspaper articles previously cited, but personal contacts with the City of Rochester Officials occurred over two years ago and continued thereafter (App. 235-360).

There is no question that the plaintiffs were less than diligent in pursuing their legal rights. At the time this suit was started the new facility was 18% completed and some 8 million dollars had been expended on the project. This is no time to start a suit, especially since the plaintiffs were on notice for almost two years prior to the start of the litigation. The defendants will suffer severe prejudice if construction were now halted as a result of this action (App. 133-146).

While Courts have been somewhat reluctant to hold plaintiffs guilty of laches in environmental cases, the doctrine has been applied where the plaintiffs claimed injuries are speculative; there is no clear harm, and the project is considerably advanced in construction. Cf. *Maryland National Park and Planning Comm. v. United States Postal Service*, 349 F.Supp. 1212, 487 F.2d 1029 (D.C. Cir. 1973).

Although mere lapse of time does not constitute laches, where there is unreasonable delay and certain prejudice to the defendants, then laches is an appropriate defense. *Harrisburg Coalition Against Running Environment v. Volpe*, 330 F. Supp.

918 (M.D. Pa. 1971). The announcement of USPS plans were made in January, 1974 and the property was purchased in July, 1974 with the architectural engineering firm hired at the same time. Certainly these dates are positive developments which should be considered to "galvanize opposition" to the proposed project. *Stenbing v. Brinegar*, 511 F.2d 489 (2d Cir. 1975); I-291 Why? *Assoc. v. Burns*, 372 F.Supp. 223 (D.C. Comm. 1974). If not those dates, certainly August 1975 would be the final date that should be considered. However, plaintiff waited a full five months after that date before bringing suit, with the construction 18% completed and 8 million dollars already expended.

In this case, the construction has progressed to the point where the costs of altering or abandoning the proposed project has certainly outweighed the benefits that might accrue to the general public by reason of plaintiffs' speculative claims. *Arlington Coalition on Transportation v. Volpe*, 458 F.2d 1323 (4th Cir. 1972).

POINT IX

There is no justiciable controversy ripe for judgment.

In order for the Court to issue a Declaratory Judgment, the controversy sought to be resolved must have "immediacy and reality." *Golden v. Zwickler*, 394 U.S. 193 (1968).

It is clear from the proof that there is no environmental controversy concerning the construction of the new facility at Henrietta. The plaintiffs have not alleged a single iota of harm from the construction or operation of this facility.

The alleged controversy concerns the ultimate disposition of the MPO in the City of Rochester. It is clear that the effect of the ultimate use to which this building and land will be put

is purely speculative. It is entirely possible that the new use may engender more employment opportunities and increase the vitality of the area. It is possible that, given the present fiscal problems of the Postal Service, it will not be economically feasible to build a new downtown retail facility and the present building will be occupied for the future.

Certainly, we are not now facing the kind of controversy "of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Golden v. Zwicker*, 394 U.S. at 108 and cases cited therein.

POINT X

The injuries claimed as a result of abandonment of the MPO are insufficient to actuate the controls of NEPA.

Plaintiffs only proof of injury in this case is limited to speculative claims of social and economic injuries resulting from the abandonment of the Rochester Post Office. In *Maryland National Park and Planning Comm. v. United States Postal Service*, 487 F.2d 1029 (D.C. Cir. 1973) the Court was troubled by "indications that the main concern, the 'overriding issue' of plaintiff is 'social and economic' rather than 'environmental' ". In the case at bar, it is not just an indication, rather, it is manifestly plaintiff's only concern.

However, the Government does not suggest that adverse socio-economic effects on people's lives is altogether outside of NEPA's scope. In this regard, several cases have recognized the importance of such impacts assessing the environmental consequences of a particular major federal action. See: *Chelsea Neighborhood Associations v. United States Postal Service*, 516 F.2d 378 (2d Cir. 1975); *Hanly v. Mitchell*, *supra*, *Hanly v. Kleindienst*, *supra*.

The reason for requiring analysis of socio-economic factors in an environmental impact statements or assessments is that these factors are frequently barometers by which the agency can attempt to gauge the value and utility of primary environmental resources. See: CEQ Guidelines, 40 CFR § 1500.8(a)(3)(ii) (1974).

It is respectfully submitted that with regard to the abandonment of the MPO in Rochester, there is no violation of NEPA either in form or spirit.

The USPS is not going to abandon the MPO; the possibility of this is non-existent at least until September, 1977 (the expected occupancy date of the new facility). Although plaintiffs' proof of injury at trial was very shallow, as well as being speculative and remote, their brief seems to allege injury on a grand scale. In order to establish the strength of Appellees' position we will address those claims of injury that appear in plaintiffs' brief. They are as follows:

1. *The abandonment of the Main Post Office will eliminate accessible employment opportunities for low-income and inner-city families in Rochester.*

There was no proof at trial that such a speculative injury might take place. Despite the fact proved at trial that no employees have been hired by the MPO in over 14 months, plaintiff offered no proof that anyone has been denied employment or would be denied employment because of the move to Henrietta. The positive proof is that the move is only 7 miles from the Main Post Office; that no employees will be terminated by the move (such termination also being prohibited by the USPS Labor Contract); that a complete profile of the employees in Rochester was done as part of the Equal Employment Opportunity Study which showed no adverse effects on employees as a result of the move; that public transportation is available to the city employees; that USPS

experience is that a move of 7 miles will not reduce accessibility to its work force and that no employees have joined in this suit or claimed any problems by reason of the move (App. 445-475).

2. *The abandonment will contribute to the flow of job opportunities to the suburbs.*

In addition to the reasons stated above concerning job opportunities, there is absolutely no proof that the City will suffer any injury. Moreover, the fact is that the City of Rochester really couldn't want the new facility downtown because: (1) it would increase the amount of tax exempt property in the city (Ex. 61-76); (2) it had no property available in excess of 15 acres in the City (Ex. 61-76); (3) City Manager Seymour Scher was not enthusiastic about a central location (Ex. 61-76); (4) central location might incur intense community opposition (Ex. 61-76) and (5) would create heavy truck traffic (Ex. 61-76).

Actually, what the City wanted was to have its cake, and eat it too. The USPS did not ignore its wishes; it searched for property in the City of Rochester and considered at least two City properties at preferred locations during the development stages. But, these were rejected after thorough study and the City could offer no other possibilities. Instead, they insist that the USPS can process mail just as well on a smaller site or in a multi-story building. This, of course, is questioning the wisdom of the USPS decision, which is not a right granted under NEPA. *Hanly I, supra* (2d Cir. 1972).

Although certainly the actual site of employment is outside the City of Rochester, there is no evidence that City residents would be hindered in any way from seeking and obtaining employment at a facility no more than 7 miles from the old site of employment (App. 135).

3. *The abandonment will increase transportation burdens of the area.*

There is no proof of this injury as even a possibility. Furthermore, the removal of an enormous amount of truck traffic to the MPO, which is now required, will do nothing but reduce transportation burdens. In addition, this reduction is further reinforced by the fact that the EEO study showed the great majority of MPO employees drive their own vehicles to work, which would also reduce the burden (Ex. 285-300).

4. *Vacant Main Post Office will negatively affect Rochester's physical environment and reduce overall vitality of the area.*

The USPS will fully occupy the MPO at least until September, 1977. The USPS has said on the record that customer service will be maintained at that location for the foreseeable future. Customer services are the only portion of the Postal Service that the general public actually use. The mail processing and operations are all conducted without public contact, and these are the only functions to be transferred to the new facility. The public will have the same services, including delivery, at the MPO until a decision is made to relocate somewhere else in the downtown area, if that decision is ever made. The local postmaster testified that Rochester needs a third downtown facility (the New Federal Building Branch and the Midtown Branch being the first two) to handle mail, so they couldn't get along without the Main Post Office. Even though the remaining services will only occupy 25 per cent of the Main Post Office, the whole building would be properly maintained, so there would definitely be no blighting due to a "vacant building" (App. 445-475). Furthermore, the plaintiffs' witness testified that a new occupant of the Main Post Office could be found that would or could result in a higher and better use of the Main Post Office (i.e., City Hall) (App. 315-319). This issue exposed by the plaintiffs is not only speculative, but remote and without foundation (App. 141-142).

CONCLUSION.

The judgment of the District Court should be affirmed in all respects.

Rochester, New York,
June 3, 1976.

Respectfully submitted,

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AFFIDAVIT OF SERVICE BY MAIL

State of New York)
County of Genesee) ss.:
City of Batavia)

City of Rochester and Genesee-Finger
Lakes Regional Planning Board
vs
United States Postal Service et al

I, Leslie R. Johnson being
duly sworn, say: I am over eighteen years of age
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Leslie R. Johnson

Sworn to before me this

5th day of June, 1976

Patricia A. Lacey

PATRICIA A. LACEY
NOTARY PUBLIC, State of N.Y., Genesee County
My Commission Expires March 30, 19.....